



Stakeholder exclusion likely? Public Participation under the Governance Regulation

**An Assessment of Article 10 in the light of the Aarhus
Convention**

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Summary

Public participation is at risk in the future Governance of the Energy Union, because both Commission draft and Council position are not in line with the EU's obligations under the Aarhus Convention (AC).

The European Union has been found in violation of Article 7 AC before (in regard to National Renewable Energy Action Plans (NREAPs) under Directive 2009/28/EC). Notwithstanding, the Commission's proposal did not implement the requirements laid out by the Compliance Committee of the Aarhus Convention (ACCC) (see Figure below for a visualization of the results per institution).

This report's analysis of the **Commission's proposal** for Article 10 of the Regulation for the Governance of the Energy Union (GReg) of November 2016 details the following gaps: 1) the scope of application is limited to National Energy and Climate Plans (NECPs) and does not apply to Long-term Strategies (LTs); 2) it is not guaranteed that stakeholders can participate early on, when all options are still open; and 3) the provision fails to reference the various Aarhus Convention standards for public participation (transparency, sufficient time for consultation and consideration of the views expressed in decision making).

The **Council's position** of December 2017 is equally non-compliant with the Aarhus Convention and even increases the risk further. Specifically, it would allow Member States to only organise public participation before the adoption of the final plan, when the number of available options has already been narrowed down and the possibility of the public to influence the NECP drafting is therefore limited.

Improvements to Article 10 GReg are necessary and possible – they could follow the proposals made by the **European Parliament** in January 2018. This includes broadening the scope of application from NECPs to NECPs and LTSs, as well as requiring transparency of information and sufficient time for consultations. Beyond the Parliament's proposals, it is necessary to require that Member States to take the outcomes of the participation process into consideration. Details per institution can be found in the Figure below.

Figure: Assessment of the proposals based on Article 7 Aarhus Convention

		Aarhus requirements	Commission	Council	Parliament
Scope	}	Plans	(+)	(+)	(+)
		Strategies	(-)	(-)	(+)
Public	}	Identify public concerned	(-)	(-)	(-)
Timing	}	Early opportunity in drafting	(+)	(-)	(+)
		When all options are open	(-)	(-)	(+)
Standards	}	Effective participation	(+)	(+)	(+)
		Sufficient time frames	(-)	(-)	(+)
		Access to information	(-)	(-)	(+)
Accountability	}	Submission to Commission	(+)	(+/-)	(+)
		Take due account of outcome	(-)	(-)	(+/-)

non-compliant ■ partly compliant ■ compliant ■

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1 Introduction

Continuous citizen engagement in the implementation of the Paris Agreement (PA) is essential for its success. The long-term objectives spelt out in the PA imply a fundamental transformation of our current economies. Initiating and organising this transformation should be based on inputs from all stakeholders – as they need to be the ones helping to realise it.

The Regulation for the Governance of the Energy Union (GReg) that has been proposed by the European Commission in November 2016 is at the core of the legislation that will shape climate and energy policies in European Union for the coming decades. Article 10 of the Governance Regulation as proposed by the European Commission lays down procedures for public participation. Member States are required to provide the public with opportunities for participation in the preparation of the National Energy and Climate Plans (NECPs) in line with the standards the EU has committed itself to under the Aarhus Convention.

In December 2017, the Council agreed on its general approach on the Governance Regulation and proposed amendments to Article 10 GReg that mainly relate to the timing for such participation. The amendments adopted by the European Parliament in January 2018 go beyond the European Commission's proposal in extending the scope to Long-term Low Emission Strategies (LTSs) and detailing the participation procedure. The European Parliament also suggested the establishment of new national "Multilevel Climate and Energy Dialogue Platforms" that would accompany the process of decision-making at the Member State level.

The negotiations of the public participation provisions under the Governance Regulation must comply with the requirements under international law, namely the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters¹. This paper provides this context and gives recommendations based on an assessment of the Aarhus Convention's requirements and the applicable provisions under Union law.

¹ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Aarhus, 25 June 1998, in force 30 October 2001, 38 *International Legal Materials* (1999), p. 517.

2 Requirements under the Aarhus Convention

The Aarhus Convention provides a legally binding framework for access to information, public participation and access to justice in the environment sector. The Aarhus Convention has been ratified by all Member States and the European Union and needs to be implemented at both levels. Relevant for the assessment of Article 10 GReg are the provisions on access to environmental information and public participation in decision making:

- ▶ **Access to information:** Parties are required to actively disseminate certain environmental information according to Article 5 AC and need to provide citizens with a right to request other environmental information according to Article 4 AC. Environmental information is information on the state of elements of the environment such as air and atmosphere, on factors such as energy that affect or are likely to affect elements of the environment, and on measures such as policies, plans and programmes that affect or are likely to affect elements of the environment (Article 1 (3) AC). Article 7 AC requires parties to ensure the public is provided with the necessary information for the purpose of participation. According to the Implementation Guide to the Aarhus Convention, these provisions need to be considered in context of each other.² The Maastricht Recommendations that have been prepared by a Task Force on Public Participation upon request by the parties to the Aarhus Convention suggest to provide the public with information about proposed plans and programmes. This includes access to draft texts and the economic analysis, cost-benefit and other analysis upon which the plan or programme is based.³ For drafts of NECPs and LTSs this means that they at least have to be made accessible upon request to comply with Article 4 AC in case their active dissemination is not already required by the parties to implement Articles 5 and 7 AC.
- ▶ **Public participation:** Article 7 AC requires Parties to provide for public participation during the preparation of plans and programmes relating to the environment with a transparent and fair framework. As NECPs relate to the environment (“air and atmosphere”), they fall within the scope of this provision. This assessment is based on the findings of the Aarhus Convention Compliance Committee (ACCC)⁴ that considered National Renewable Energy Action Plans (NREAPs) under Directive 2009/28/EC⁵ as plans or programmes relating to the environment subject to Article 7 AC.⁶ Although not labelled as plans or programmes, the same must apply to LTSs. Article 7 AC may not specifically mention strategies, but findings of the ACCC suggest that they are covered by the term “plans and programmes” in Article 7 AC: First, the label of a decision under domestic law – here Union law – is not decisive for its categorization.⁷ Second, Article 7 AC may cover different stages of consecutive strategic decisions that fall between individual decisions for projects under Article 6 AC and general normative decisions under Article 8 AC.⁸ Finally, regional development strategies have been classified as plans relating to the environment under Article 7

² UNECE (2014): The Aarhus Convention: An implementation guide, 2nd edition, pp. 85, 109,

https://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf.

³ UNECE (2015): Maastricht Recommendations on Promoting Effective Public Participation in Decision-making in Environmental Matters, p. 49, http://www.unece.org/fileadmin/DAM/env/pp/Publications/2015/1514364_E_web.pdf.

⁴ The ACCC has been established by MOP 1 in October 2002 via Decision 1/7 to review compliance with and implementation of the provisions of the Aarhus Convention. It has to consider submission by other parties, referrals by the Secretariat and communications from the public.

⁵ Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, OJ L 140 of 05.06.2009, p. 16.

⁶ ACCC, Findings and recommendations with regard to communication ACCC/C/2010/54 concerning compliance by the European Union ECE/MP.PP/C.1/2012/12, 2 October 2012, para. 75.

⁷ ACCC, Findings and recommendations with regard to communication ACCC/C/2008/26 concerning compliance by Austria, ECE/MP.PP/C.1/2009/6/Add.1, 8 February 2011, para. 55.

⁸ ACCC, Findings and recommendations with regard to communication ACCC/C/2006/17 concerning compliance by the European Community, ECE/MP.PP/2008/5/Add.10, 2 May 2008, para 51.

AC.⁹ Also, the Maastricht Recommendations suggest a broad interpretation of “terms and programmes” and recommend a public participation for any type of strategic decision that is regulated by legislative provisions.¹⁰ Consequently, the following standards are applicable for public participation in the preparation of NECPs and LTSs: The procedures for participation need to include reasonable time-frames for the different phases, allowing for sufficient time for information, preparation and participation (Articles 7, 6 (3) AC). Parties have to provide for early participation, when all options are open and effective participation can take place (Articles 7, 6 (4) AC). In the decision, due account has to be taken of the outcome of the public participation (Article 7, 6 (8) AC). Also, parties need to provide the necessary information to the public (Article 7 AC). This is at least information about the commencement of the process and the possibilities to participate as well as information relevant to the preparation of the plans and programmes themselves.¹¹

In its findings the ACCC has clarified the requirements for the European Union when implementing the Aarhus Convention by passing on requirements to Member States: Legislative acts such as regulations and directives only comply with Article 7 AC if they require Member States to have proper participatory procedures in accordance with the Aarhus Convention, make reference to the requirements of Article 6 (3), (4) and (8) AC and if they also require Member States to report on the implementation.¹² In regard to the NREAPs that meant that Directive 2009/28/EC was found to be non-compliant with Article 7 AC by the ACCC in 2012 as the requirements did “not unequivocally point Member States [...] in the direction of the requirements of the [Aarhus] Convention when adopting plans or programmes relating to the environment”¹³. In response, the European Commission took steps to require Member States to implement Article 7 AC.¹⁴ The same standards that the ACCC applied to NREAPs under Directive 2009/28/EC are applicable for public participation in the preparation of NECPs and LTSs under Article 10 GReg.

⁹ ACCC, Findings and recommendations with regard to ACCC/C/2009/43 concerning compliance by Armenia, ECE/MP.PP/2011/11/Add.1, April 2011, para. 52.

¹⁰ UNECE (2015): Maastricht Recommendations on Promoting Effective Public Participation in Decision-making in Environmental Matters, p. 46, http://www.unece.org/fileadmin/DAM/env/pp/Publications/2015/1514364_E_web.pdf.

¹¹ UNECE (2014): The Aarhus Convention: An implementation guide, 2nd edition, p. 178, https://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf.

¹² ACCC, Findings and recommendations with regard to communication ACCC/C/2010/54 concerning compliance of the European Union, ECE/MP.PP/C.1/2012/12, 2 October 2012, para 80.

¹³ ACCC, Findings and recommendations with regard to communication ACCC/C/2010/54 concerning compliance of the European Union, ECE/MP.PP/C.1/2012/12, 2 October 2012, para 79.

¹⁴ European Commission (2016): Report to the Aarhus Convention Compliance Committee on Follow-up in Case ACCC/C/2010/54, p. 3, https://www.unece.org/fileadmin/DAM/env/pp/compliance/MoP5decisions/V.9g_EU/frPartyV9a_27.10.2016_third_progress_report.pdf.

3 Related requirements under EU law

The rights under the Aarhus Convention for access to information and public participation in the environment sector have been implemented on the European level via the Access to Information Directive¹⁵, the Public Participation Directive¹⁶ and the Strategic Environmental Assessment (SEA) Directive¹⁷. These directives require Member States to implement the Aarhus Convention in the areas that are predefined by EU law. For access to information and public participation in decision-making of European institutions the Aarhus Regulation¹⁸ applies.

3.1 Requirements for public participation on Member State level

The Access to Information Directive, the Public Participation Directive and the SEA Directive are applicable in addition to the provisions on public participation under the proposed Governance Regulation as the provisions under Article 10 GReg apply “without prejudice to any other Union law requirements”. Article 10 GReg also clarifies the relationship between the Governance Regulation and the SEA Directive: Following the relevant requirements for public participation under the SEA Directive is sufficient to comply with the requirements under Article 10 GReg. While the following requirements under the three directives are relevant for stakeholder engagement in general, they are not necessarily applicable to NECPs and LTSs:

- ▶ **SEA Directive:** The public participation provisions under the SEA Directive only apply to plans and programmes “which set the framework for future development consent of projects” subject to an environmental impact assessment (Article 3 (2) (a)). This provision has to be interpreted broadly in the light of the SEA Directive's objective to ensure an environmental impact assessment for plans and programmes, which are likely to have significant effects on the environment.¹⁹ Still, the notion of “plans and programmes” relates to “measure[s] which establish [...] by defining rules and procedures for scrutiny applicable to the sector concerned, a significant body of criteria and detailed rules for the grant and implementation of one or more projects likely to have significant effects on the environment”.²⁰ The content of NECPs and LTSs as laid down in Chapter 2 and Chapter 3 of the Commission's proposal is rather general and does not necessarily include criteria and detailed rules that are relevant for the individual authorisation of a project that requires an environmental impact assessment. Therefore, NECPs and LTSs might – depending on the Member States' implementation – qualify as “plans and programmes” under the SEA Directive, but not necessarily do so.
- ▶ **Public Participation Directive:** The requirements for public participation under the Public Participation Directive apply to plans and programmes listed in its Annex I (Article 2 (2)). As neither NECPs nor LTSs are listed in that Annex, public participation for NECPs and LTSs is not covered by these requirements. The Public Participation Directive implements the standards for public participation in the preparation of plans according to Article 7 AC. However, NECPs and LTSs

¹⁵ Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, OJ L 41 of 14.02.2003, p. 26.

¹⁶ Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, OJ L 156 of 25.06.2003, p. 17.

¹⁷ Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, OJ L 197 of 21.07.2001, p. 30.

¹⁸ Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ L 264 of 25.9.2006, p. 13.

¹⁹ ECJ, C-290/15, *Patrice D'Oultremont and Others v Région wallonne*, Judgment of 27 October 2016, EU:C:2016:816, para. 39.

²⁰ ECJ, C-290/15, *Patrice D'Oultremont and Others v Région wallonne*, Judgment of 27 October 2016, EU:C:2016:816, para. 39.

would need to be added to Annex I to make the standards formulated by the Public Participation Directive applicable to them.

- ▶ Access to Information Directive: NECPs qualify as environmental information under the Access to Information Directive as they are measures that affect or are likely to affect air and atmosphere as elements of the environment, and energy as a factor with likely effects on the environment (Article 2 (1)). While Member States have to actively disseminate such plans, there is no equivalent requirement for them to make drafts available to the public (Article 7 (2)). However, citizens or environmental groups may request access to such information from the competent authorities as provided for by Article 4 of the Access to Information Directive. Still, the provisions under the Access to Information Directive cannot substitute missing provisions on the publication of documents necessary to effectively participate in decision making processes. Therefore, Article 10 GReg needs regulate access to draft strategies and plans.

3.2 Requirements for public participation on European level

For the European institutions, the rights related to access to information and public participation enshrined in the Aarhus Convention have been implemented via the Aarhus Regulation that modifies the Access to Documents Regulation²¹ to enhance transparency, and determines standards for public participation in the preparation of plans and programmes by European institutions. The provisions supplement the provisions of the Governance Regulation for the LTS that needs to be prepared by the European Commission.

- ▶ Participation: Article 9 (1) of the Aarhus Regulation requires European institutions to provide, through appropriate practical and/or other provisions, early and effective opportunities for the public to participate during the preparation, modification or review of plans or programmes relating to the environment. Further provisions detail standards for public participation to implement Article 7 AC. Up to now the ECJ has not yet clarified whether plans and programmes as defined in Article 2 (1) (e) of the Aarhus Regulation would comprise strategies such as the LTSs. Considering that the Aarhus Regulation implements the Aarhus Convention on European level, the wide interpretation of the term “plans and programmes” under Article 7 AC should also apply in the context of the Article 9 of the Aarhus Regulation.
- ▶ Transparency: Articles 4 to 7 supplement the Access to Documents Regulation²² in regard to active dissemination of environmental information and requests for access to such information. The provisions require European institutions to actively make available plans, programmes and strategies – drafts thereof are not explicitly mentioned. Whether or not drafts need to be actively disseminated or not, they can at least be accessed by using the right to request environmental information under Article 2 (1) of the Access to Documents Regulation as modified by Article 6 of the Aarhus Regulation.

²¹ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145 of 31.05.2001, p. 43.

²² Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ L 264, 25.09.2006, p. 13.

4 The proposals of European Commission, Council and European Parliament

Article 10 (entitled “Public consultation”) of the **Commission’s** proposal for a Governance Regulation of November 2016 requires Member States to ensure public participation in the preparation of draft NECPs.²³ The public is to be given “early and effective opportunities to participate” and Member States would be obliged to summarise the public’s views and attach them to the draft plans they are submitting to the Commission. The provision applies “without prejudice to any other Union law requirements” and public consultations conducted under the SEA Directive for draft NECPs are “deemed to satisfy” the requirements of Article 10 GReg. The obligation to produce national LTSs, established and regulated under Article 14 GReg, does not fall within the scope of public participation under Article 10 GReg. LTSs are connected to NECPs through the consistency clause in Article 14 (3) GReg that provides that “long-term low emission strategies and the integrated national energy and climate plans [...] should be consistent with each other”. However, no separate requirement for public involvement is included in Article 14 GReg. Hence, the Commission’s proposal on this matter is insufficient to be compliant with the Aarhus Convention. Furthermore, the Commission’s proposal for Article 10 GReg does not comply with the Aarhus Convention as it does not point Member States sufficiently to the requirements of Article 7 AC and does not reference the relevant standards for public participation under the Aarhus Convention.

In December 2017, the **Council** adopted its general approach to the Commission’s proposal.²⁴ In contrast to the proposal of the Commission, the Council grants Member States a second alternative (“or”) for the timing of participation in the development process for their NECPs: Member States would not have to ensure public participation in the preparation of the draft plan, but can postpone public consultation until well before the adoption of the final plan. Member States would then attach a “summary of the public’s view or provisional views” either to the draft or to the final NECPs they submit to the Commission. In case a Member State opts for a late participation well before the adoption of the final plan, the outcome of the public participation would not be part of the Commission’s review conducted for draft NECPs under Article 9 GReg. In comparison with the Commission’s proposal, the options added by the Council even increase the risk of non-compliance with Article 7 AC as they do not guarantee and early participation when all options are still open.

The **Parliament** adopted its position on amendments to the Commission’s proposal in January 2018. These include an extension of the scope of Article 10 GReg to LTSs and also determine more standards for the participation process.²⁵ These relate to the procedure and timing for participation as well as the necessary access to information:

²³ Proposal for a Regulation of the European Parliament and of the Council on the Governance of the Energy Union, amending Directive 94/22/EC, Directive 98/70/EC, Directive 2009/31/EC, Regulation (EC) No 663/2009, Regulation (EC) No 715/2009, Directive 2009/73/EC, Council Directive 2009/119/EC, Directive 2010/31/EU, Directive 2012/27/EU, Directive 2013/30/EU and Council Directive (EU) 2015/652 and repealing Regulation (EU) No 525/2013, COM/2016/0759 final/2 - 2016/0375 (COD).

²⁴ General approach of the Council of 18 December 2017 on the Proposal for a Regulation of the European Parliament and of the Council on the Governance of the Energy Union, amending Directive 94/22/EC, Directive 98/70/EC, Directive 2009/31/EC, Regulation (EC) No 663/2009, Regulation (EC) No 715/2009, Directive 2009/73/EC, Council Directive 2009/119/EC, Directive 2010/31/EU, Directive 2012/27/EU, Directive 2013/30/EU and Council Directive (EU) 2015/652 and repealing Regulation (EU) No 525/2013, 15891/17, ENER 521, CLIMA 356, CODEC 2113.

²⁵ Amendments adopted by the European Parliament on 17 January 2018 on the proposal for a regulation of the European Parliament and of the Council on the Governance of the Energy Union, amending Directive 94/22/EC, Directive 98/70/EC, Directive 2009/31/EC, Regulation (EC) No 663/2009, Regulation (EC) No 715/2009, Directive 2009/73/EC, Council Directive 2009/119/EC, Directive 2010/31/EU, Directive 2012/27/EU, Directive 2013/30/EU and Council Directive (EU) 2015/652 and repealing Regulation (EU) No 525/2013 (COM(2016)0759 – C8-0497/2016 – 2016/0375(COD)), P8_TA-PROV(2018)0011.

- ▶ **Process:** Member States have to set “reasonable time frames” that allow for “sufficient time” for the public for information, preparation and participation. They are required to take “due account of equal participation”.
- ▶ **Timing:** While the Commission's proposal only mentions the necessity for an early opportunity for participation in the preparation of the draft NECPs, the Parliament suggests participation in “different stages of planning process”.
- ▶ **Information:** Member States are required to ensure that the public is informed either by public notice or by other appropriate means such as electronic media. Information to be provided includes all practical arrangements related to participation and access to relevant documents.

To increase accountability, Member States have to attach not only a summary of the public’s views with the draft and final plan as well as with the LTSs, but also of the way such views have been taken into consideration. Additionally, the consistency clause in Article 14 (3) GReg is rendered mandatory as “integrated national energy and climate plans [...] shall be consistent with the long-term climate and energy strategies.” Finally, the obligation to adopt LTSs is extended to the European Commission which acts on behalf of the European Union. The amendments proposed by the European Parliament comply in many aspects with the requirements of Article 7 AC.

Comparing the **different proposals** and evaluating them in the light of the Aarhus Convention, there are several shortcomings. While the Commission’s proposal already lacks to comply with Article 7 AC as understood by the ACCC, the options added by the Council even worsen the situation. The amendments of the European Parliament to Article 10 GReg would in most aspects ensure compliance with Article 7 AC. The figure below summarises the findings of this analysis for each of the three institutions, indicating separately for all key aspects of public participation the extent to which Commission, Council and Parliament comply with the requirements of the Aarhus Convention. It shows the Commission is largely non-compliant with Article 7 AC. The Council’s position even worsens the situation in regard to the requirement for an early participation. In contrast, the Parliament’s position is largely in compliance, with only two areas that need improvement.

Figure: Assessment of the proposals based on Article 7 Aarhus Convention

		Aarhus requirements	Commission	Council	Parliament
Scope	}	Plans	(+)	(+)	(+)
		Strategies	(-)	(-)	(+)
Public	}	Identify public concerned	(-)	(-)	(-)
Timing	}	Early opportunity in drafting	(+)	(-)	(+)
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Standards	}	Effective participation	(+)	(+)	(+)
		Sufficient time frames	(-)	(-)	(+)
		Access to information	(-)	(-)	(+)
Accountability	}	Submission to Commission	(+)	(+/-)	(+)
		Take due account of outcome	(-)	(-)	(+/-)

non-compliant ■ partly compliant ■ compliant ■

5 Conclusion and recommendations

The ACCC has clearly detailed the obligations of the European Union under the Aarhus Convention for NREAPs under Directive 2009/28/EC. In case Article 10 GReg is not rendered compliant with Article 7 AC, the EU risks another lengthy ACCC compliance procedure to the detriment of the various stakeholders that are needed to implement effective energy and climate policies. Member States would not be required to collect inputs from all types of stakeholders to win their support – at least not for the important first round of planning that would probably take place before the ACCC can issue new findings.

Based on the assessment of the existing legal obligations and the different versions of the GReg proposed by Commission, Council and Parliament, the following recommendations should be implemented to ensure compliance with the Aarhus Convention:

- ▶ Scope of application: To ensure broad stakeholder engagement in shaping future energy and climate policies in the EU, enabling public participation in the preparation of both NECPs as well as LTSs should be mandatory. While the Commission's proposal only provides for the participation in the preparation of the plans, the amendments of the Parliament extend the scope to the strategies. Public participation for plans is mandatory under international law due to Article 7 AC. This is less clear for LTSs as strategies are not explicitly mentioned in Article 7 AC and Article 4 (19) PA is silent on the process for the preparation of such strategies. However, the findings of the ACCC suggest that strategies nonetheless fall within the scope of Article 7. In case of LTSs, there are strong arguments to require a public participation equivalent to the one for plans. First, the strategies **should** – as laid down in the Commission Proposal – or **shall** – as required in the amendments of the Parliament – be consistent with NECPs. And second, the planning processes for NECPs and LTSs run parallel to each other with the LTSs providing the long-term perspective for the NECPs. The scope of Article 10 GReg should therefore cover NECPs and LTSs.
- ▶ Definition of public: Article 7 Aarhus Convention requires authorities to identify the public concerned which may participate in the participation procedure. This requirement is not yet referenced in Article 10 GReg and therefore needs to be added to ensure compliance with Article 7 AC. To achieve a buy-in from all relevant stakeholders and for reasons of clarity, a non-exhaustive list of stakeholders to be consulted could be added including cities and regions, businesses, science, consumer protection associations, trades unions, civil society as well as the general public.²⁶ The amendments of the Parliament call for the establishment of multilevel climate and energy dialogue platforms via inclusion of an Article 10a GReg without linking these platforms directly to public participation. Although they are not necessary to implement the Aarhus Convention, such platforms could provide an added value in bringing together all relevant stakeholders.
- ▶ Timing of participation: Stakeholder engagement can only contribute to the acceptance and legitimacy of decisions in case it starts during an early phase and can influence the decision-making process. The Commission's proposal requires Member States to give the public early opportunities to participate in the preparation of the draft NECPs. The amendments of the Parliament add as an additional requirement that participation takes place, “when all options are open and effective public consultation can take place.” Both requirements implement the Aarhus Convention that requires Parties to “provide for early public participation, when all options are open and effective public participation can take place” (Articles 7, 6 (4) AC). Therefore, they are mandatory requirements for public participation in the preparation of plans. A late participation of the public

²⁶ Duwe et al. (2017), Governance of the Energy Union – Assessment of the Commission Proposal for a Governance Regulation, p. 10, https://www.ecologic.eu/sites/files/publication/2017/duwe_et_al._2017_assessment_of_governance_regulation_-_ecologic_institute.pdf.

well before the adoption of the final plan as proposed by the Council as a second option for the timing of participation would be in violation of Article 7 AC. Well before the adoption of the final plan, the number of available options has already been narrowed down and the possibility of the public to influence the process is therefore limited. The Council's proposal would also limit the opportunity of the Commission to include consultation results in its assessment of the draft NECPs.²⁷ Implementing the amendments proposed by the European Parliament are necessary to comply with Article 7 AC.

- ▶ Phase for participation: To ensure stakeholders are involved throughout the process, appropriate windows for participation need to be identified. The Commission's proposal only requires Member States to ensure opportunities for participation in the preparation of the draft NECPs. That gives discretion to Member States as to the exact timing for participation during the different phases of draft preparation and the number of opportunities provided to the public during preparation. Concerning this question, the amendments of the Parliament do not go beyond the Commission's proposal. Article 7 AC only requires the opportunity to participate during the preparation of plans and does not give further guidelines. In regard to the phase for participation, it is therefore sufficient to stick to the Commission's proposal to comply with Article 7 AC. However, for clarification, the Governance Regulation could specify the phases relevant for participation.²⁸
- ▶ Standards for participation: To find a balance between public participation and efficiency, certain standards have evolved over time that are reflected in the Aarhus Convention. The Commission's proposal only requires Member States to ensure opportunities for effective participation. The amendments of the Parliament also require Member States to set reasonable timeframes allowing sufficient time for information, preparation and participation – a requirement that stems from the Aarhus Convention (Articles 7, 6 (4) AC). Therefore, the amendments proposed by the Parliament need to be implemented to comply with Article 7 AC. The requirement for Member States to take due account of equal participation as proposed by the Parliament is not necessary to implement the Aarhus Convention, but could create trust among stakeholders.
- ▶ Accountability: Views expressed during participation are more likely to influence decision-making in case decision-makers are required to take them into consideration and have to account for that. The Commission's proposal only requires Member States to attach a summary of the views to the draft plan they submit to the Commission. The Parliament requires in addition that Member States have to describe how the views have been taken into consideration. The Aarhus Convention formulates a similar requirement and requires parties to ensure that in decisions due account is taken of the outcome of participation (Article 7, 6 (8) AC). To comply with the Aarhus Convention, it is therefore necessary to implement the amendments proposed by the European Parliament.
- ▶ Access to information: While the Commission's proposal does not address the question of information access, the Parliament suggests to require Member States to ensure the public is informed, whether by public notices or other appropriate means, such as electronic media where available, of all practical arrangements related to their participation and that they can access all relevant documents. This requirement stems from the Aarhus Convention (Article 7 AC) and can also be found in the Public Participation Directive (Article 2 (2)). To comply with Article 7 AC, the question of access to the necessary information needs to be addressed in Article 10 GReg.

²⁷ Toporek (2018): Public participation as part of the EU Climate Governance Regulation could help transition to a cleaner, more efficient energy future, <https://www.clientearth.org/public-participation-part-eu-climate-governance-regulation-help-transition-cleaner-efficient-energy-future/>.

²⁸ Duwe et al. (2017): Governance of the Energy Union – Assessment of the Commission Proposal for a Governance Regulation, p. 10, https://www.ecologic.eu/sites/files/publication/2017/duwe_et_al._2017_assessment_of_governance_regulation_-_ecologic_institute.pdf.

6 Annex: Relevant legal provisions and related decisions

6.1 Provisions of the Aarhus Convention

Definition of environmental information

<p>Article 2</p> <p><i>Definitions</i></p>
<p>For the purposes of this Convention,</p> <p>[...]</p> <p>3. “Environmental information” means any information in written, visual, aural, electronic or any other material form on:</p> <p>(a) The state of elements of the environment, such as <i>air and atmosphere</i>, water, soil, land, landscape and natural sites, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;</p> <p>(b) Factors, such as substances, <i>energy</i>, noise and radiation, and activities or measures, including administrative measures, environmental agreements, <i>policies, legislation, plans and programmes</i>, affecting or likely to affect the elements of the environment within the scope of subparagraph (a) above, and cost-benefit and other economic analyses and assumptions used in environmental decision-making;</p> <p>(c) The state of human health and safety, conditions of human life, cultural sites and built structures, inasmuch as they are or may be affected by the state of the elements of the environment or, through these elements, by the factors, activities or measures referred to in subparagraph (b) above;</p> <p>[...]</p>

Request of access to information

<p>Article 4</p> <p><i>Access to Environmental Information</i></p>
<p>1. Each Party shall ensure that, subject to the following paragraphs of this article, public authorities, in <i>response to a request for environmental information, make such information available to the public</i>, within the framework of national legislation, including, where requested and subject to subparagraph (b) below, copies of the actual documentation containing or comprising such information:</p> <p>(a) Without an interest having to be stated;</p> <p>(b) In the form requested unless:</p> <p>(i) It is reasonable for the public authority to make it available in another form, in which case reasons shall be given for making it available in that form; or</p> <p>(ii) The information is already publicly available in another form.</p>

[...]

3. A request for environmental information may be refused if:

(a) The public authority to which the request is addressed does not hold the environmental information requested;

(b) The request is manifestly unreasonable or formulated in too general a manner; or

(c) The request concerns **material in the course of completion or concerns internal communications of public authorities** where such an exemption is provided for in national law or customary practice, taking into account the public interest served by disclosure.

[...]

Active dissemination of information

Article 5

Collection and Dissemination of Environmental Information

1. Each Party shall ensure that:

(a) Public authorities possess and update environmental information which is relevant to their functions;

(b) Mandatory systems are established so that there is an adequate flow of information to public authorities about proposed and existing activities which may significantly affect the environment;

(c) In the event of any imminent threat to human health or the environment, whether caused by human activities or due to natural causes, all information which could enable the public to take measures to prevent or mitigate harm arising from the threat and is held by a public authority is disseminated immediately and without delay to members of the public who may be affected.

2. Each Party shall ensure that, within the framework of national legislation, the way in which public authorities make environmental information available to the public is transparent and that environmental information is effectively accessible, inter alia, by:

(a) Providing sufficient information to the public about the type and scope of environmental information held by the relevant public authorities, the basic terms and conditions under which such information is made available and accessible, and the process by which it can be obtained;

(b) Establishing and maintaining practical arrangements, such as:

(i) Publicly accessible lists, registers or files;

(ii) Requiring officials to support the public in seeking access to information under this Convention; and

(iii) The identification of points of contact; and

(c) Providing access to the environmental information contained in lists, registers or files as referred to in subparagraph (b) (i) above free of charge.

3. Each Party shall ensure that environmental information progressively becomes available in electronic databases which are easily accessible to the public through public telecommunications networks. Information accessible in this form should include:

- (a) Reports on the state of the environment, as referred to in paragraph 4 below;
 - (b) Texts of legislation on or relating to the environment;
 - (c) As appropriate, policies, plans and programmes on or relating to the environment, and environmental agreements; and
 - (d) Other information, to the extent that the availability of such information in this form would facilitate the application of national law implementing this Convention, provided that such information is already available in electronic form.
4. Each Party shall, at regular intervals not exceeding three or four years, publish and disseminate a national report on the state of the environment, including information on the quality of the environment and information on pressures on the environment.
5. Each Party shall take measures within the framework of its legislation for the purpose of disseminating, inter alia:
- (a) Legislation and policy documents such as documents on **strategies, policies, programmes and action plans relating to the environment**, and progress reports on their implementation, prepared at various levels of government;
 - (b) International treaties, conventions and agreements on environmental issues; and
- [...]
7. Each Party shall:
- (a) Publish the **facts and analyses of facts which it considers relevant and important in framing major environmental policy proposals**;
 - (b) Publish, or otherwise make accessible, available explanatory material on its dealings with the public in matters falling within the scope of this Convention; and
- [...]

Public participation

Article 6

Public Participation in Decisions on Specific Activities

- [...]
3. The public participation procedures shall include **reasonable time-frames** for the different phases, allowing **sufficient time for informing** the public in accordance with paragraph 2 above and for the public to prepare and participate effectively during the environmental decision-making.
4. Each Party shall provide for **early public participation**, when all options are open and effective public participation can take place.
- [...]
8. Each Party shall ensure that in the decision **due account is taken of the outcome** of the public participation.

Article 7

Public Participation concerning Plans, Programmes and Policies relating to the Environment

Each Party shall make appropriate practical and/or other provisions for the public to participate during the preparation of **plans and programmes relating to the environment**, within a transparent and fair framework, having provided the necessary information to the public. Within this framework, **article 6, paragraphs 3, 4 and 8, shall be applied**. The public which may participate shall be identified by the relevant public authority, taking into account the objectives of this Convention. To the extent appropriate, each Party shall endeavour to provide opportunities for public participation in the preparation of policies relating to the environment.

6.2 Directives implementing the Aarhus Convention

SEA Directive

Article 3

Scope

1. An environmental assessment, in accordance with Articles 4 to 9, shall be carried out for **plans and programmes** referred to in paragraphs 2 to 4 which are likely to have significant environmental effects.
2. Subject to paragraph 3, an environmental assessment shall be carried out for all plans and programmes,
 - (a) which **are prepared for** agriculture, forestry, fisheries, **energy, industry**, transport, waste management, water management, telecommunications, tourism, town and country planning or land use **and which set the framework for future development consent of projects** listed in Annexes I and II to Directive 85/337/EEC, or
 - (b) which, in view of the likely effect on sites, have been determined to require an assessment pursuant to Article 6 or 7 of Directive 92/43/EEC.

Article 6

Consultations

[...]

2. The authorities referred to in paragraph 3 and the public referred to in paragraph 4 shall be given an **early and effective opportunity** within **appropriate time frames** to express their opinion on the draft plan or programme and the accompanying environmental report before the adoption of the plan or programme or its submission to the legislative procedure.

[...]

4. Member States shall identify the public for the purposes of paragraph 2, including the public affected or likely to be affected by, or having an interest in, the decision-making subject to this Directive, including relevant non-governmental organisations, such as those promoting environmental protection and other organisations concerned.

5. The detailed arrangements for the information and consultation of the authorities and the public shall be determined by the Member States.

Article 8

Decision making

The environmental report prepared pursuant to Article 5, the opinions expressed pursuant to Article 6 and the results of any transboundary consultations entered into pursuant to Article 7 shall be **taken into account** during the preparation of the plan or programme and before its adoption or submission to the legislative procedure.

Public Participation Directive

Article 2

Public participation concerning plans and programmes

1. For the purposes of this Article, "the public" shall mean one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups.

2. Member States shall ensure that the public is given **early and effective opportunities** to participate in the preparation and modification or review of the plans or programmes required to be drawn up under the provisions **listed in Annex I**.

To that end, Member States shall ensure that:

(a) the public is informed, whether by **public notices or other appropriate means such as electronic media** where available, about any proposals for such plans or programmes or for their modification or review and that relevant **information about such proposals** is made available to the public including inter alia information about the right to participate in decision-making and about the competent authority to which comments or questions may be submitted;

(b) the public is entitled to express comments and opinions **when all options are open** before decisions on the plans and programmes are made;

(c) in making those decisions, **due account shall be taken of the results of the public participation**;

(d) having examined the comments and opinions expressed by the public, the competent authority makes reasonable efforts to inform the public about the decisions taken and the reasons and considerations upon which those decisions are based, including information about the public participation process.

3. Member States shall identify the public entitled to participate for the purposes of paragraph 2, including relevant non-governmental organisations meeting any requirements imposed under national law, such as those promoting environmental protection.

The detailed arrangements for public participation under this Article shall be determined by the Member States so as to enable the public to prepare and participate effectively.

Reasonable time-frames shall be provided allowing **sufficient time** for each of the different stages of public participation required by this Article.

[...]

Access to Information Directive

Article 2

Definitions

For the purposes of this Directive:

1. 'Environmental information' shall mean any information in written, visual, aural, electronic or any other material form on:

(a) the state of the elements of the environment, such as **air and atmosphere**, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, **energy**, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, **plans, programmes**, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

[...]

Article 3

Access to environmental information upon request

1. Member States shall ensure that public authorities are required, in accordance with the provisions of this Directive, to **make available environmental information** held by or for them to any applicant **at his request** and without his having to state an interest.

[...]

Article 7

Dissemination of environmental information

1. Member States shall take the necessary measures to ensure that public authorities organise the environmental information which is relevant to their functions and which is held by or for them, with a view to its **active and systematic dissemination to the public**, in particular by means of computer telecommunication and/or electronic technology, where available.

The information made available by means of computer telecommunication and/or electronic technology need not include information collected before the entry into force of this Directive unless it is already available in electronic form.

Member States shall ensure that environmental information progressively becomes available in electronic databases which are easily accessible to the public through public telecommunication networks.

2. The information to be made available and disseminated shall be updated as appropriate and shall include at least:

(a) texts of international treaties, conventions or agreements, and of Community, national, regional or local legislation, on the environment or relating to it;

(b) policies, **plans and programmes** relating to the environment;

[...]

6.3 Proposals for Article 10 of the Governance Regulation

European Commission (30.11.2016)

Article 10

Public consultation

Without prejudice to any other Union law requirements, Member States shall ensure that the public is given **early and effective opportunities** to participate in the preparation of **draft plans** referred to in Article 9 and attach to the submission of their draft integrated national energy and climate plan to the Commission a **summary of the public's views**. In so far as the provisions of Directive 2001/42/EC are applicable, consultations undertaken in accordance with that Directive shall be deemed to satisfy also the obligations to consult the public under this Regulation.

European Council (18.12.2017)

Article 10

Public consultation

Without prejudice to any other Union law requirements, Member States shall ensure that the public is given **early and effective opportunities** to participate in the preparation of the **draft plan [] or, well before its adoption, of the final plan []** and attach to the submission of their draft [] or final integrated national energy and climate plan to the Commission a summary of the public's views or provisional views. In so far as the provisions of Directive 2001/42/EC are applicable, consultations undertaken on the draft in accordance with that Directive shall be deemed to satisfy also the obligations to consult the public under this Regulation.

European Parliament (17.01.2018)

Article 10

Public consultation

(1) Without prejudice to any other Union law requirements, Member States shall ensure that the public is given **early and effective opportunities** to participate in the preparation of draft plans referred to in Article 9, of **long-term strategies** referred to in Article 14, **when all options are open and effective public consultation can take place**.

(1a) Member States shall set **reasonable timeframes** allowing **sufficient time** for the public to be informed and to prepare and participate effectively in the **different stages of planning process**. Member States **shall take due account of equal participation** and ensure that the **public is informed**, whether by public notices or other appropriate means, such as electronic media where available, of all practical arrangements related to their participation and that they can access all relevant documents.

(1b) Member States shall include in the submission of their draft and final integrated national energy and climate plan and of their long-term strategies to the Commission a **summary of the public's views** and the **way they have been taken into consideration**.

(1c) In so far as the provisions of Directive 2001/42/EC are applicable, consultations undertaken in accordance with that Directive shall be **deemed to satisfy** also the obligations to consult the public under this Regulation.

(1d) Member States shall **limit administrative complexity** when implementing this Article.

Article 10a

Multilevel Climate and Energy Dialogue Platform

(1) In a spirit of partnership, Member State shall establish a permanent Multilevel Climate and Energy Dialogue Platform to support active engagement of local authorities, civil society organisations, business community, investors, any other relevant stakeholders and the general public in managing the energy transition.

(2) Member States shall submit to their national Climate and Energy Dialogue Platform **different options and scenarios envisaged for their short, medium and long-term energy and climate policies**, together with a cost-benefit analysis for each option. Climate and Energy Dialogue Platforms shall be **forums for discussion on and elaboration of plans, strategies and reports** pursuant to Article 10.

(3) Member States shall ensure that Climate and Energy Dialogue Platforms benefit from adequate human and financial resources and shall function in a transparent way.

6.4 Case law of the European Court of Justice

C-290/15, *Patrice D'Oultremont and Others v Région wallonne*, Judgment of 27 October 2016, EU:C:2016:816

37 - By its question, the referring court asks in essence whether Articles 2(a) and 3(2)(a) of Directive 2001/42 must be interpreted as meaning that a **regulatory order, such as that at issue in the main proceedings, containing various provisions concerning the installation of wind turbines which must be respected in the granting of administrative consent for the installation and operation of such installations** come under the definition of 'plans and programmes' within the meaning of that directive.

38 - First, it must be noted that it is apparent from recital 4 of Directive 2001/42 that environmental evaluation is an important tool for integrating environmental considerations into the preparation and adoption of certain plans and programmes.

39 - Next, and as was stated by the Advocate General in point 34 of her Opinion, the **delimitation of the definition of 'plans and programmes' in relation to other measures not coming within the material scope of Directive 2001/42 must be made with regard to the specific objective laid down in Article 1 of that directive, namely to subject plans and programmes which are likely to have significant effects on the environment to an environmental assessment** (see, to that effect, judgment of 28 February 2012, Inter-Environnement Wallonie and Terre wallonne, C-41/11, EU:C:2012:103, paragraph 40 and the case-law cited).

40 - Consequently, given the objective of Directive 2001/42, which is to provide for a high level of protection of the environment, the **provisions which delimit the directive's scope, in particular those setting out the definitions of the measures envisaged by the directive, must be interpreted broadly** (see, to that effect, judgments of 22 March 2012, Inter-Environnement Bruxelles and Others, C-567/10, EU:C:2012:159, paragraph 37, and of 10 September 2015, Dimos Kropias Attikis, C-473/14, EU:C:2015:582, paragraph 50).

41 - As regards Article 2(a) of Directive 2001/42, the **definition of 'plans and programmes' laid down in that provision sets out the cumulative condition that they are, first, subject to preparation and/or adoption by an authority at national, regional or local level or are prepared by an authority for adoption, through a legislative procedure by Parliament or Government, and, secondly, required by legislative, regulatory or administrative provisions.**

42 - It follows from the findings of the referring court that the order of 13 February 2014 was prepared and adopted by a regional authority, in this case the Walloon Government, and that that order is required by the provisions of the Decree of 11 March 1999.

43 - For its part, Article 3(2)(a) of Directive 2001/42 provides, subject to paragraph 3 of that article, that **an environmental assessment is to be carried out for all plans and programmes which are prepared, inter alia, for the energy sector and which set the framework for future development consent for projects listed in Annexes I and II to Directive 2011/92.**

44 - It is also common ground that the order of 13 February 2014 concerns the energy sector and that it helps to define the framework for the implementation, in the Walloon Region, of wind farm projects which form part of the projects listed in Annex II to Directive 2011/92.

45 - As for the term 'plans and programmes', whilst it is true that it must cover a specific area, the fact nonetheless remains that **it is not apparent from the wording of either Article 2(a) of Directive 2001/42 or Article 3(2)(a) of that directive that those plans or programmes must concern planning for a given area.** It follows from the **wording of those provisions that they cover, in the wider sense, regional and district planning in general.**

46 - According to the findings of the referring court, **the order of 13 February 2014 concerns the entire Walloon Region and the limit values that it lays down in respect of noise are closely connected with that region, since those limits are determined in relation to the various uses of the geographical areas in question.**

47 - As regards the argument that the order of 13 February 2014 does not set out a sufficiently complete framework concerning the wind power sector, it should be recalled that the assessment of the criteria laid down in Articles 2(a) and 3(2)(a) of Directive 2001/42 for determining whether an order, such as that at issue in the main proceedings, may come within that definition must in particular be carried out in the light of the objective of that directive, which, as is apparent from

paragraph 39 of the present judgment, is to make decisions likely to have significant environmental effects subject to an environmental assessment.

48 - Furthermore, as the Advocate General stated in point 55 of her Opinion, it ***is necessary to avoid strategies which may be designed to circumvent the obligations laid down in Directive 2001/42 by splitting measures, thereby reducing the practical effect of that directive*** (see, to that effect, judgment of 22 March 2012, Inter-Environnement Bruxelles and Others, C-567/10, EU:C:2012:159, paragraph 30 and the case-law cited).

49 - Having regard to that objective, it should be noted that the notion of 'plans and programmes' relates to ***any measure which establishes, by defining rules and procedures for scrutiny applicable to the sector concerned, a significant body of criteria and detailed rules for the grant and implementation of one or more projects likely to have significant effects on the environment*** (see, to that effect, judgment of 11 September 2012, Nomarchiaki Aftodioikisi Aitolokarnanias and Others, C-43/10, EU:C:2012:560, paragraph 95 and the case-law cited).

50 - In the present case, it should be noted that the ***order of 13 February 2014 concerns, in particular, technical standards, operating conditions (particularly shadow flicker), the prevention of accidents and fires (inter alia, the stopping of the wind turbine), noise level standards, restoration and financial collateral for wind turbines***. Such standards have a ***sufficiently significant importance and scope in the determination of the conditions applicable to the sector concerned and the choices, in particular related to the environment, available under those standards must determine the conditions under which actual projects for the installation and operation of wind turbine sites may be authorised in the future***.

51 - Lastly, relying on the Aarhus Convention and the Kiev Protocol, the French Government seeks to distinguish the notion of 'plans and programmes' from that of 'general rules', under which it claims that the order of 13 February 2014 comes, with the result that that order does not come within the scope of Directive 2001/42.

52 - In that regard, it should be noted that it is apparent from the actual wording of Article 2(a), first indent, of that directive, borne out by the case-law referred to in paragraph 49 of the present judgment, that the ***notion of 'plans and programmes' can cover normative acts adopted by law or regulation***.

53 - Moreover, as the Advocate General stated in point 70 of her Opinion, ***Directive 2001/42 differs from the Aarhus Convention and the Kiev Protocol inasmuch as that directive does not contain any special provisions in relation to policies or general legislation that would call for them to be distinguished from 'plans and programmes'***.

54 - It follows from all of the foregoing that the answer to the question referred is that Articles 2(a) and 3(2)(a) of Directive 2001/42 must be interpreted as meaning that a regulatory order, such as that at issue in the main proceedings, containing various provisions on the installation of wind turbines which must be complied with when administrative consent is granted for the installation and operation of such installations comes within the notion of 'plans and programmes', within the meaning of that directive.

6.5 Case law of the Aarhus Convention Compliance Committee

European Union ACCC/C/2010/54; ECE/MP.PP/C.1/2012/12, 2 October 2012

75 - The Committee finds that ***Ireland's NREAP constitutes a plan or programme relating to the environment subject to article 7 of the Convention because it sets the framework for activities by which Ireland aims to enhance the use of renewable energy in order to reduce greenhouse gas emissions***, based on Directive 2009/28/EC. This view was taken by the communicant and was also confirmed by the Party concerned during the oral hearing and in writing in response to questions by the Committee. It follows from article 7 of the Convention that when an NREAP is prepared by a Party to the Convention, the requirements for public participation set out in article 6, paragraphs 3, 4 and 8, of the Convention apply, albeit that in the context of article 7 of the Convention "[t]he public which may participate shall be identified by the relevant public authority, taking into account the objectives of the Convention".

77 - The Party concerned should have in place a regulatory framework to ensure proper implementation of the Convention. ***The Party concerned chose not to apply the SEA Directive to the adoption of NREAPs by its member States; instead it chose to incorporate a process for public participation in Directive 2009/28/EC. While this is a choice for the Party concerned***, it is the task of the Committee to examine whether the Party concerned has indeed properly implemented article 7 of the Convention. The Committee in this respect notes that a framework for implementing the Convention with respect to plans and programmes concerning the environment, including plans and programmes related to renewable energy, should have been in place since February 2005, when the EU became a Party to the Convention.

79 - The template adopted on the basis of article 4, paragraph 2, of Directive 2009/28/EC determines how member States are to adopt NREAPs. The template comprises minimum requirements that member States are to comply with in the preparation of their NREAPs. Among these requirements are reporting obligations related to public participation (see para. 23 above). ***The Committee finds that these requirements are of a very general nature and do not unequivocally point Member States, including Ireland, in the direction of the requirements of the Convention when adopting plans or programmes relating to the environment based on EU law, in casu, plans related to renewable energy and, more in particular, NREAPs.***

80 - ***A proper regulatory framework for the implementation of article 7 of the Convention would require Member States, including Ireland, to have in place proper participatory procedures in accordance with the Convention. It would also require Member States, including Ireland to report on how the arrangements for public participation made by a Member State were transparent and fair and how within those arrangements the necessary information was provided to the public. In addition, such a regulatory framework would have made reference to the requirements of article 6, paragraphs 3, 4 and 8, of the Convention, including reasonable time-frames, allowing for sufficient time for informing the public and for the public to prepare and participate effectively, allowing for participation when all options are open and how due account is taken of the outcome of the public participation.***

Armenia ACCC/C/2009/43, ECE/MP.PP/2011/11/Add.1, April 2011

49 - The Committee notes that the EIA Law subjects decisions for planned activities and "concepts" (see paras. 15–18 above) to an EIA procedure. The distinction between a planned

activity and a concept in the EIA Law appears to reflect the distinction between decisions for specific activities under article 6 of the Convention, and plans and programmes under article 7 of the Convention. **The Convention does not clearly define what the plans, programmes and policies of article 7 encompass, and leaves it to the national legislature to detail the specificities of the decisions within the general framework of the Convention.**

52 - "**The Concept for the exploitation of the Teghout deposits may be considered a regional development strategy and sectoral planning which falls under article 15 of the EIA Law and article 7 of the Convention, as a plan relating to the environment;** or it may be the first phase (expressed as an "intention") for a planned activity under article 6 of the EIA Law and article 6 of the Convention. While Armenian law provides for public participation in different phases of an activity and as early as possible, it does not indicate with precision the particular features of an "intention to carry out a planned activity", a "planned activity" or a "concept". It is further not clear what the legal effects of the approval of the concept on 30 September 2005 by the interagency commission were. **As already observed in the past, it is sometimes difficult to determine prima facie whether a decision falls under article 6 or 7 of the Convention,** but in all cases the requirements of paragraphs 3, 4 and 8 of article 6 apply (see ACCC/C/2005/12, (Albania), ECE/MP.PP/C.1/2007/4/Add.1, para. 70) for plans and programmes. **However, it is important to identify what the legal effects of an act are — whether an act constitutes a decision under article 7 or a first phase/intention for a planned activity under article 6, because only some of the public participation provisions of article 6 apply to decisions under article 7."**

Austria ACCC/C/2008/26, ECE/MP.PP/C.1/2009/6/Add.1, 8 February 2011

50 - The communication refers to a number of consecutive decisions and decision-making processes. Whether any one of these decisions amount to a permitting decision under article 6, or a decision to adopt a plan, programme or policy under article 7 of the Convention, must be determined on a contextual basis, taking into account the legal effects of each decision.

European Community ACCC/C/2006/17, ECE/MP.PP/2008/5/Add.10, 2 May 2008

51 - The requirement for "early public participation, when all options are open" should be seen first of all within a concept of tiered decision-making, whereby at each stage of decision-making certain options are discussed and selected with the participation of the public and each consecutive stage of decision-making addresses only the issues within the option already selected at the preceding stage. Thus, according to the particular needs of a given country and the subject matter of the decision-making, **Parties have a certain discretion as to which range of options is to be discussed at each stage of the decision-making. Such stages may involve various consecutive strategic decisions under article 7 of the Convention (policies, plans and programmes)** and various individual decisions under article 6 of the Convention authorizing the basic parameters and location of a specific activity, its technical design, and finally its technological specifications related to specific environmental standards. Within each and every such procedure, where public participation is required, it should be provided early in the procedure when all options are open and effective public participation can take place.